In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00149-CR

HAROLD BLAIN SCHMIDT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause No. 08-07-06706 CR

MEMORANDUM OPINION

A jury convicted Harold Blain Schmidt of one count of felony murder, one count of intoxication assault, and two counts of failure to stop and render aid. The jury assessed punishment at life in prison for felony murder, twenty years for intoxication assault, and sixteen years for each count of failure to stop and render aid. The trial court sentenced Schmidt in accordance with the jury's verdict, ordered the sentences to run concurrently and, sentenced Schmidt to confinement in the Texas Department of

Criminal Justice, Correctional Institutions Division, for life. We find Schmidt's eight issues are without merit. Consequently, we affirm the trial court's judgment.

BACKGROUND

On May 11, 2008, Schmidt, while driving a Ford truck, collided with a motorcycle occupied by Lexie Edward Haynes, IV, and his wife Cheryl Haynes. Lexie Haynes died immediately from the injuries he received from the collision; Cheryl Haynes suffered severe head injuries, but survived.

On the day of the collision Jeff and Kimberly Naiser, along with their daughter, were traveling east on FM 2854 towards Loop 336 in Conroe. Mr. Naiser recalled that as he was driving, a Ford truck driven by Schmidt pulled out in front of him, requiring him to slow down. Mr. Naiser followed the Ford toward Conroe for approximately two miles. He testified Schmidt was not driving erratically and did not appear intoxicated. He traveled behind Schmidt as both vehicles approached Loop 336 and pulled into the left-hand turn lane and stopped. It appeared to Mr. Naiser that Schmidt intended to turn left onto the cloverleaf access to Loop 336. While waiting behind Schmidt, Mr. Naiser observed a motorcycle traveling west on FM 2854. Mr. Naiser could see the motorcycle clearly and testified that nothing was obstructing Schmidt from seeing the approaching motorcycle. He testified it was a clear, pretty day. There was no smoke or fog interfering with visibility, and the sun was to his back. He observed Schmidt turn directly into the path of the oncoming motorcycle. The Nasiers testified that the driver of the motorcycle

had no time to react and collided with the Ford driven by Schmidt. Mr. Naiser immediately pulled to the side of the road to help. He testified that Schmidt "just sat there," but when he eventually did exit the vehicle, he asked Mr. Naiser what had happened. Mr. Naiser testified that he responded, "You got to be kidding me. You just pulled in front of that motorcycle." Schmidt did not reply.

Kimberly Naiser also recalled the Ford pulling out in front of their vehicle that day. She testified the truck "kind of fish-tailed trying to get out of [their] way." She recalled commenting to her husband that the driver of the Ford truck "must have been drunk" because of the way he had pulled out in front of them. She testified that after the collision Schmidt appeared confused and not at all concerned about the Hayneses.

Mari Ann Chapman was also at the intersection when the collision occurred. She witnessed Schmidt exit the truck, throw his hat on the ground and start pacing back and forth by his vehicle. She could not hear exactly what Schmidt was saying, but testified he seemed angry and appeared to be cursing.

Cynthia Stoker, a registered nurse, was traveling west on FM 2854 behind the motorcycle. She witnessed the motorcycle hit the Ford truck. She immediately exited her vehicle and went to aid the driver and passenger of the motorcycle. She testified Schmidt was unsteady on his feet, had slurred speech and had an "atrocious" smell of alcohol on his person. She instructed another person at the scene to remove Schmidt from where she was attending to the female passenger because she was scared that

Schmidt would fall on her. Based on her experience and training as a trauma nurse, she testified Schmidt was intoxicated.

Walter Cochran and his wife, Jayleen Cochran, drove up on the scene after the collision occurred. They also attempted to render aid to the Hayneses. He recalled that his wife noticed Schmidt leaving the scene and he decided to follow Schmidt. He told Schmidt that he could not leave, and Schmidt repeatedly responded that he needed to make a phone call. Ms. Cochran also observed Schmidt at the scene and testified that when Schmidt walked past her he smelled of alcohol.

Officer Kevin Johnson of the Conroe Police Department testified regarding his level of training and experience in recognizing intoxicated people. He testified that while in route to the collision, another officer advised him that Schmidt was fleeing from the scene. Upon arrival, Johnson was sent to retrieve Schmidt. He observed Schmidt and determined that he was intoxicated, describing him as "comatose drunk." Thereafter, Johnson handcuffed Schmidt and brought him back to the scene of the collision. Once there, Schmidt admitted to Johnson that he was the driver of the Ford truck in the collision. Schmidt also advised Johnson that "he had a couple of beers earlier in the day." Johnson testified that Schmidt refused the HGN and field sobriety test, so Johnson explained to Schmidt that Texas law allowed his blood to be withdrawn without his consent. Schmidt reiterated to Johnson that Johnson was "not getting the blood specimen

from him." Johnson recalled that Schmidt was gruff, defensive, angry, combative and belligerent. Johnson transported Schmidt to the ER to obtain a blood sample.

The ER nurse that assisted in obtaining a blood sample from Schmidt testified that Schmidt was uncooperative, unhappy and "quite belligerent." She recalled he yelled obscenities, including some directed at her. They ultimately had to restrain Schmidt to draw his blood. She testified that Schmidt appeared intoxicated and that his breath smelled of alcohol.

Camille Stafford, a forensic scientist with the Texas Department of Public Safety (D.P.S.) Crime Lab tested Schmidt's blood and testified that the alcohol concentration in Schmidt's sample was 0.33 grams of alcohol per hundred milliliters of blood. She explained to the jury that the legal standard for intoxication in Texas is 0.08 grams and that anyone with this concentration or higher is legally intoxicated.

Officer Jeffrey Smith specializes in fatality accident investigations. He is a field sobriety practitioner and is a certified drug recognition expert. The Conroe Police Department dispatched Smith on May 11 to investigate the collision. Smith testified that he asked Schmidt for a blood sample because Schmidt had already refused to provide a breath sample. Schmidt continued to refuse to give blood. Officer Smith observed Schmidt that night around 9:00 p.m. at the jail in the detox tank. He testified Schmidt had a "drunk-like appearance" and was intoxicated. After completing his investigation, Smith determined that the primary factor of the crash was Schmidt's failure to yield the

right of way to the oncoming motorcycle. He further testified that Schmidt's failure to yield the right of way to the oncoming motorcycle was an act that was clearly dangerous to human life. Smith concluded that Schmidt's intoxication contributed to the collision. As a result of his investigation, Officer Smith concluded that Schmidt was at fault for this collision.

SUFFICIENCY OF EVIDENCE

Schmidt claims his conviction should be reversed for insufficiency of evidence. To determine the sufficiency of the evidence, the appellate court must review all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Under the *Jackson* standard, the reviewing court gives full deference to the jury's responsibility to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Hooper*, 214 S.W.3d at 13.[1]

[1] "[T]he *Jackson v. Virginia* legal-sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Brooks v. State*, No. PD-0210-09, slip op. ¶ 1 (Tex. Crim. App. Oct. 6, 2010), *available at* http://www.cca.courts.state.tx.us/OPINIONS/HTMLOPINIONINFO.ASP?OPINIONID=20190 (overruling *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1966)).

A. Intoxication

Schmidt argues that there is insufficient evidence to prove intoxication since there was no evidence to show Schmidt's blood alcohol content at the time of his driving. Under the Texas DWI statute, a person is intoxicated when either (1) the person does not have the "normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body;" or (2) the person "ha[s] an alcohol concentration of 0.08 or more." Tex. Penal Code Ann. § 49.01(2) (West 2003). These two definitions of intoxication are not mutually exclusive. *Kirsch v. State*, 306 S.W.3d 738, 743 (Tex. Crim. App. 2010). "[A]s long as there is evidence that would support both definitions, [then] both theories are submitted in the jury charge." *Id*. When the trial court submits alternate means by which the State may prove intoxication, the evidence is sufficient to support a general verdict of "guilty" if it is sufficient to prove any one of the alleged means. *Bagheri v. State*, 119 S.W.3d 755, 761-62 n.5 (Tex. Crim. App. 2003).

In *Stewart v. State*, the defendant took an intoxilyzer test approximately eighty minutes after she had been driving, which indicated her blood alcohol concentration was over the legal limit. 129 S.W.3d 93, 95 (Tex. Crim. App. 2004). The Court of Criminal Appeals noted that the jury had other evidence to consider in deciding the issue of intoxication, including the defendant's driving patterns, the defendant's field sobriety test

results, the defendant's admissions to the officer regarding her alcohol consumption, the officer's videotape recording of the defendant, and that the authorities conducted the breath tests an hour and twenty minutes after the defendant's traffic stop. *Id*. at 97. The Court held that the trial court properly admitted the breath test results along with all other evidence of intoxication to determine whether the defendant was intoxicated. *Id*.

In *Kirsch,* the State submitted to the jury the result of the defendant's blood alcohol test, which was taken approximately eighty minutes after the accident. 306 S.W.3d at 740, 742. The trial court charged the jury on both statutory definitions of intoxication. *Id*. at 742. The Court paraphrased its holding in *Stewart* that although the intoxilyzer "test result was not 'conclusive' evidence of the defendant's intoxication at the time she was driving, it was probative and, coupled with the other evidence, could suffice to prove per se intoxication at the time she was driving." *Id.* at 744 (citing *Stewart,* 129 S.W.3d at 97). After a review of other Texas cases dealing with this issue, the Court concluded,

> BAC-test results, even absent expert retrograde extrapolation testimony, are often highly probative to prove both per se and impairment intoxication. However, a BAC-test result, by itself, is not sufficient to prove intoxication at the time of driving. There must be other evidence in the record that would support an inference that the defendant was intoxicated at the time of driving as well as at the time of taking the test.

Id. at 745. The Court held that

> evidence is sufficient to support a jury charge on the "per se" theory of intoxication if it includes either (1) expert testimony of retrograde

> extrapolation, or (2) other evidence of intoxication that would support an inference that the defendant was intoxicated at the time of driving as well as at the time of taking the test.

Id. at 745-46. In *Kirsch*, the court found the evidence sufficient to support a jury charge on the per se theory of intoxication when, in combination with the BAC-test result, the jury heard evidence of the defendant's driving almost 20 m.p.h. over the speed limit prior to the accident, the defendant's failure to see and avoid hitting an 18-wheel tractor-trailer, the defendant's failure to brake until less than one second before impact, the defendant's unconsciousness immediately after the accident, which precluded an inference that he drank after the accident, the odor of alcohol in his body shortly after the accident, the presence of vodka bottle caps in the patrol car, the defendant's belligerence at the hospital and other behavior consistent with intoxication, and his "obviously intoxicated" appearance at the emergency room, according to ER personnel. *Id*. at 746.

Here, the jury had to decide whether Schmidt was intoxicated at the time he was driving the Ford when it collided with the motorcycle. Similar to *Stewart* and *Kirsch*, in addition to the blood alcohol test results, the jury had other evidence to consider in deciding Schmidt's intoxication. The jury heard testimony that Schmidt failed to see and turned directly into the path of the oncoming motorcycle when there was nothing to obstruct his vision. Witnesses at the scene of the accident observed Schmidt immediately after the collision occurred and testified that Schmidt was unsteady on his feet, had slurred speech, and smelled of alcohol, leading them to believe he was intoxicated.

The officer that first approached Schmidt determined that he was intoxicated and described him as "comatose drunk." He based his opinion on Schmidt's appearance, his actions, and his walking and talking functions. The officer testified Schmidt's speech was slurred and that he had "glassy, bloodshot eyes" and was sweating profusely. He also noted a very "strong odor of an alcoholic beverage emitting from [Schmidt's] breath and person." He testified that Schmidt "stumbl[ed] back and forth" while walking to the car. Schmidt admitted that "he had a couple of beers earlier in the day." Schmidt refused the HGN, the field sobriety test and refused to give a blood sample. Schmidt was gruff, defensive, angry, combative and belligerent. The ER nurse that assisted in obtaining Schmidt's blood sample corroborated the officer's impressions by testifying that Schmidt was uncooperative, unhappy and "quite belligerent." He "yell[ed] obscenities" at her. She recalled that Schmidt's breath smelled of alcohol and that he appeared intoxicated. Finally, another officer observed Schmidt around 9:00 p.m. that night at the jail and testified that Schmidt had a "drunk-like appearance." He too testified that he had no doubt that Schmidt was intoxicated.

From this record, we conclude the evidence is sufficient for a rational jury to find Schmidt was intoxicated while driving the Ford truck at the time of the collision. Accordingly, we overrule issue five.

B. Murder

Schmidt argues that there is insufficient evidence to prove that Schmidt's "failure

to yield [the] right of way to a vehicle" constituted an act clearly dangerous to human life. The indictment charged Schmidt with murder under section 19.02[2] of the Texas Penal Code. In relevant part, the statute provides that

> [a] person commits an offense if he . . . commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

Tex. Penal Code Ann. §19.02(b)(3) (West 2003).

The indictment provided that Schmidt committed an "act clearly dangerous to human life" when he "operated a motor vehicle and failed to yield the right of way to a vehicle operated by Lexie Edward Haynes, IV, thereby striking the vehicle being operated by Lexie Edward Haynes, IV[.]"

Multiple witnesses testified at trial that Schmidt suddenly turned into the path of the oncoming motorcycle at a point when the motorcycle could not avoid the collision. Officer Smith, the accident investigator who reconstructed the crash, determined that the primary factor of the crash was Schmidt's failure to yield the right of way to the motorcycle. He further specifically testified that Schmidt's failure to yield the right of way to the motorcycle was an act that was clearly dangerous to human life. Importantly, there was no evidence or testimony to contradict this conclusion.

[2] The indictment and judgment in this case erroneously referenced section 19.02(a)(3) of the Penal Code. The correct code section is section 19.02(b)(3). *See* Tex. Penal Code Ann. § 19.02(b)(3) (West 2003).

This evidence is sufficient for a rational jury to find that Schmidt's failure to yield the right of way to the motorcycle was an act clearly dangerous to human life. Issue seven is overruled.

ADMISSIBILITY OF EVIDENCE

Schmidt complains that the trial court erred in overruling his objection to Officer Johnson's testimony regarding the number of intoxicated people he has encountered during his career. Johnson testified that "almost half the time" he responds to a call, he encounters someone that is "drunk, high, on something[.]" He estimated that he encountered people under the influence of alcohol "[h]undreds and thousands" of times. He then testified that based on his training and experience he believed Schmidt was intoxicated at the time of the accident. Schmidt argues that this testimony is irrelevant and highly prejudicial in that the State "intended to elicit a sense of fear in the jury" and "scare the jury into believing that all intoxicated persons are guilty." At trial, however, Schmidt's counsel objected to this testimony only on the basis of relevance. Therefore, we only review this issue for error on that basis and do not review the testimony to determine its prejudicial nature, if any, as Schmidt did not properly preserve such argument. *See* Tex. R. App. P. 33.1.

The admissibility of evidence generally, and the qualifications of a witness to testify as an expert or as a lay witness, is within the discretion of the trial court. *See* Tex. R. Evid. 104(a); *see also Harnett v. State*, 38 S.W.3d 650, 657 (Tex. App.—Austin 2000,

pet. ref'd). Since the admissibility of this testimony is within the discretion of the trial court, we will not reverse absent a finding of an abuse of discretion.

Relevant evidence is evidence that has a tendency to make the existence of any fact more or less probable than it would be without the evidence. Tex. R. Evid. 401. Before a lay witness may express an opinion, the proponent of the opinion testimony must first show that the opinion or inference is "rationally based on the perception of the witness" and that the opinion is "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Tex. R. Evid. 701. "[O]nce the proponent of the opinion establishes personal knowledge of the facts underlying the opinion, [then] he has satisfied the perception requirement of Rule 701." *Solomon v. State*, 49 S.W.3d 356, 364 (Tex. Crim. App. 2001) (quoting *Fairow v. State*, 943 S.W.2d 895, 899 (Tex. Crim. App. 1997)). "[A] police officer's personal knowledge may come from his past experience." *Roberson v. State*, 100 S.W.3d 36, 39 (Tex. App.—Waco 2002, pet. ref'd) (police officer offered permissible lay opinion on characteristics of rape victims based on his experience in investigating such crimes).

Immediately following the disputed testimony the State asked whether the officer believed, based on his experience, that Schmidt was intoxicated. The disputed testimony helps form the basis for Johnson's opinion that Schmidt was intoxicated. Johnson's past experience with other intoxicated individuals is part of his personal knowledge and is relevant to show the basis of his opinion. *See* Tex. R. Evid. 701. The trial court did not

abuse its discretion in overruling the objection and admitting the testimony. We overrule Schmidt's second issue.

PRESERVATION OF ERROR

A party must register a timely objection that states the specific legal basis for his objection to preserve a complaint for appellate review. Tex. R. App. P. 33.1(a)(1)(A); *Layton v. State*, 280 S.W.3d 235, 238-39 (Tex. Crim. App. 2009). Unpreserved error may be reviewed if the error is a fundamental error that affects a defendant's substantial rights. Tex. R. Evid. 103(d); *Marin v. State*, 851 S.W.2d 275, 279-80 (Tex. Crim. App. 1993). However, there are few rights that must be affirmatively waived and may therefore be raised for the first time on appeal. *Marin*, 851 S.W.2d at 280.

A. Prosecutor's Statement During Voir Dire

Schmidt contends that the prosecutor committed fundamental error during the voir dire of a veniremember by informing the member that the jury would hear additional evidence during the punishment phase of the trial. Schmidt specifically argues that by making this statement in front of the entire venire panel the State "entices and encourages the jury to find the defendant guilty so that they can be told the information that was withheld during the guilt/innocence phase [of the trial]."

An improper remark by the prosecutor during voir dire is preserved for review on appeal if the defendant objected when the prosecutor made the remark. *See Beltran v. State*, 99 S.W.3d 807, 811-12 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd)

(holding defendant's failure to object to the prosecutor's improper statements to the jury regarding her personal opinions waives error); *Campos v. State*, 946 S.W.2d 414, 416-18 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (holding that defendant's failure to object to improper prosecutorial statement waives error). Schmidt concedes that his attorneys did not object to the prosecutor's statement at trial, but contends that the error affected a fundamental right and therefore his failure to timely object is irrelevant. We disagree.

We hold that there was no fundamental error and as such, Schmidt failed to preserve his complaint regarding the prosecutor's comments for appeal. Tex. R. App. P. 33.1(a)(1)(A). The prosecutor made the comment in response to a veniremember's concern about sitting in judgment of an individual without hearing all of the evidence. The prosecutor's comments did not rise to such a level as to bear on the presumption of innocence or vitiate the impartiality of the jury and therefore do not implicate the doctrine of fundamental error. *See Jasper v. State*, 61 S.W.3d 413, 421 (Tex. Crim. App. 2001).

Had Schmidt timely objected, the trial court could have issued a curative instruction that would have dissipated any potential prejudice. Schmidt did not object to the prosecutor's statements at voir dire, thus he has not preserved error on appeal. Issue one is overruled.

B. Custodial Interrogation

Schmidt argues that the State violated his federal and state constitutional rights by

conducting a custodial interrogation without reading him his *Miranda* rights. Specifically, Schmidt objects to Officer Johnson's testimony relating Schmidt's admission to him that he had been driving the Ford-150, as well as his admission that he had been drinking earlier in the day. Schmidt's counsel did not object to the prosecutor's questions that elicited this testimony.

Schmidt lodged a general objection to Officer Johnson's testimony that he "asked Mr. Schmidt why he ran from the scene of the accident if he felt he was not at fault." During a bench discussion, the prosecutor and Schmidt's trial counsel resolved this objection by agreeing to admonish the officer not to testify about Schmidt's responses to police initiated interrogation. Schmidt's counsel asked for no further relief, and stated, "With those admonishments, I think we can continue."

A defendant's failure to object in a timely and specific manner during trial forfeits his complaints on appeal about the admissibility of evidence. *Saldano v. State*, 70 S.W.3d 873, 889 (Tex. Crim. App. 2002). "This is true even though the error may concern a constitutional right of the defendant." *Id*. For an appellant to complain about the admissibility of a confession or statements, even in regard to a violation of *Miranda*, the appellant must make an objection in the trial court that called the trial court's attention to the particular complaint raised on appeal. *See Ex parte Bagley*, 509 S.W.2d 332, 333 (Tex. Crim. App. 1974).

Further, when the trial court gives an appellant all the relief he requested at trial, the appellant has nothing to complain of on appeal. *Cook v. State*, 858 S.W.2d 467, 473 (Tex. Crim. App. 1993). An "'[a]ppellant must obtain an adverse ruling in order to preserve a matter for review.'" *Id*. (quoting *Nethery v. State*, 692 S.W.2d 686, 701 (Tex. Crim. App. 1985)).

Since Schmidt failed to raise the *Miranda* objection at trial to the testimony regarding Schmidt's statements that he was driving the Ford and that he had been drinking, this issue is not preserved for review. *See Gauldin v. State*, 683 S.W.2d 411, 413 (Tex. Crim. App. 1984), *overruled on other grounds by State v. Guzman*, 959 S.W.2d 631, 634 (Tex. Crim. App. 1998). Moreover, when the trial court sustained Schmidt's objection to the testimony regarding Schmidt's running from the scene of the collision, Schmidt asked for the witness to be admonished. The witness was admonished. Because Schmidt received the relief he requested, he failed to preserve any error on this issue. *See Cook*, 858 S.W.2d at 473. Issue three is overruled.

C. Admissibility of Johnson's Testimony: Nature of Initial Charge

Schmidt contends that the trial court erred when it prevented his trial counsel from presenting potentially exculpatory evidence by informing Schmidt's trial counsel that questioning Officer Johnson about Schmidt's initial charge of intoxication manslaughter would open the door to his other convictions and bad acts.

During the cross-examination of Johnson, Schmidt's counsel asked, "What were the charges that Mr. Schmidt was being booked in for?" The prosecutor objected to relevance of this question. Outside the presence of the jury, the prosecutor expounded on his objection indicating that he believed through this line of questions regarding Schmidt's initial charges, specifically the district attorney's decision to change the initial manslaughter charge to a murder charge was the defense's attempt to portray the district attorney's office as "somehow selectively being [vindictive] towards this defendant". Further, the prosecutor explained that if the defense presented evidence of the initial charge, then that would open the door to Schmidt's entire criminal history, which becomes relevant to explain why the district attorney changed the charge. The trial court informed Schmidt's counsel that if he presented evidence of the initial charge and subsequent revision before the jury, then the district attorney's reasons for making this change would become relevant.

The trial court then brought the jury back in to proceed with the cross-examination of Officer Johnson. The trial court confirmed that it overruled the State's relevance objection. Thereafter, Schmidt's counsel proceeded with a different line of questions unrelated to Schmidt's initial charge. The trial court interrupted the defense's examination and asked whether he wanted an answer to the initial charge question. At which point, defense counsel indicated he would withdraw the question. The trial court overruled the State's objection. The defense then made a strategic decision to withdraw

the question. Under these facts, Schmidt presents nothing for appellate review. *See* Tex. R. App. P. 33.1(a); *see also Napier v. State*, 887 S.W.2d 265, 266-67 (Tex. App.—Beaumont 1994, no pet.) (holding error was waived because counsel withdrew question before court sustained State's objection). We overrule issue number four.

D. Stafford's Testimony: Burden of Proof

Schmidt contends that the State impermissibly shifted the burden of proof to him by eliciting testimony from D.P.S. forensic scientist Stafford that Schmidt had not requested to conduct his own test of the blood specimen. The State maintains Stafford's testimony was proper rebuttal evidence to Schmidt's intimation that the State may not have properly preserved the sample.

During his cross-examination of the nurse that drew the blood sample from Schmidt, defense counsel asked whether she refrigerated the blood after she withdrew it from Schmidt. She explained that she gives the blood to the police. Defense counsel further asked whether there was a preservative in the vial before the sample was taken, to which the nurse responded there was. Defense counsel continued to question the nurse about the chemical makeup of the preservative in the vial, the manufacturer of the vial, and the expiration date on vial. Defense counsel then asked similar questions of Stafford. He questioned her concerning how the sample arrived, proper storage of the sample and the affects of various environmental factors on the sample. For the first time on appeal, Schmidt complains about the prosecutor's redirect examination of Stafford, specifically

the portion asking her whether Schmidt asked to test the specimen while it was in her custody. Schmidt did not object to the prosecutor's questions during trial and therefore, did not preserve this issue for review. *See* Tex. R. App. P. 33.1(a)(1)(A).

Even if Schmidt had preserved this issue for review, we hold that the prosecutor's questions did not impermissibly shift the burden of proof to the defense. In support of his contention that this line of questions was improper, Schmidt relies on several cases, but each case involves whether the prosecutor's comment during argument concerned the defendant's failure to testify. *See Goff v. State*, 931 S.W.2d 537, 548 (Tex. Crim. App. 1996); *Swallow v. State*, 829 S.W.2d 223, 225 (Tex. Crim. App. 1992); *Montoya v. State*, 744 S.W.2d 15, 35 (Tex. Crim. App. 1987), *overruled on other grounds by Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996); *Saldivar v. State*, 980 S.W.2d 475, 501 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd); *Rodriguez v. State*, 787 S.W.2d 504, 506 (Tex. App.—El Paso 1990, no pet.). In the case before us, however, the prosecutor's questions and Stafford's responding testimony did not concern testimony from Schmidt. Instead, the testimony involved Schmidt's failure to produce evidence other than his own testimony.

Generally, the State can comment on a defendant's failure to present evidence in his favor. *See Pope v. State*, 207 S.W.3d 352, 365 (Tex. Crim. App. 2006). Moreover, "prosecutorial comment on the absence of evidence is proper so long as 'the language can reasonably be construed to refer to appellant's failure to produce evidence other than his

own testimony." *Bible v. State*, 162 S.W.3d 234, 249 (Tex. Crim. App. 2005) (quoting *Patrick v. State*, 906 S.W.2d 481, 491 (Tex. Crim. App. 1995)).

Here, the prosecutor's questions and Stafford's responding testimony was in response to Schmidt's cross-examination regarding the proper preservation of the blood sample. While we find that Schmidt did not properly preserve this issue for appeal, even had he preserved this issue, the prosecutor's questions did not impermissibly shift the burden of proof to the defense. Issue six is overruled.

E. Improper Jury Argument in Closing Statement

Schmidt contends that the State impermissibly requested punishment in its closing by stating "[t]hat [a verdict of guilty] is the only way we keep this man off the road forever." The record reflects that during the State's closing argument, the prosecutor explained to the jury:

> [T]he Judge has instructed you in this charge that you are to address matters of guilt or innocence only. Punishment is not your concern. Not now. Now, if there is a guilty verdict; yes, there will be a punishment hearing. Much shorter than a trial, but there will be additional evidence and there will be another hearing. That's not for you to concern yourself on. If you have feelings of hatred or sympathy toward this defendant, if I have offended you in any way or if you feel the police have treated anybody unfairly during the course, you know all that stuff is really for punishment. Because what does that have to do with the main issue you're being asked to decide? Did he do it or not? That's all.

The prosecutor later reiterated that whether a deadly weapon was used is "a special issue that affects punishment and other things down the line that you don't really need to

concern yourself with." During the defense's closing argument, Schmidt's attorney argued to the jury:

> Ladies and gentlemen, from a very practical standpoint, a very real standpoint, he'll be 60 years old in a couple of months. Any amount of time you give him in prison, which he knows is where he's headed, could be his final home. This trial isn't about the facts. We haven't disputed the facts. You saw the evidence. It wasn't a lot of ways to dispute the facts. This case is just about whether Mr. Schmidt is going to be branded a murderer when he goes to his final home.

In the continuance of the State's closing argument, the prosecutor argued:

> All you can do is call this crime what it is. Come back with a verdict of guilty. And that is the only way that we can keep this man off the road forever. So, Cheryl['s] family, so Eddie's family, so none of you will ever have to face the possibility of ever driving on the road with this guy ever again.

Schmidt's counsel made no objections to the State's closing argument at trial.

A defendant forfeits his right not to be subjected to incurable erroneous jury arguments when he fails to insist on this right at trial. *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996). A defendant's failure to object to a jury argument forfeits his right to complain about the argument on appeal. *Id.* As Schmidt did not object to the State's closing argument at trial, he forfeited his right to complain on appeal that any portion thereof was erroneous jury argument. We overrule Schmidt's eighth issue.

Having overruled each of appellant's issues, we affirm the trial court's judgment.

AFFIRMED.

_____

CHARLES KREGER
Justice

Submitted on September 7, 2010
Opinion Delivered November 3, 2010
Do not publish

Before McKeithen, C.J., Kreger and Horton, JJ.